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Supreme Court, U.S.
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No _____

IN THE

Supreme Court of the United States

October Term, 1991

THOMAS H. GANNON, JR.,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Does the doctrine of collateral estoppel, as applicable to criminal prosecutions through the Double Jeopardy Clause, bar the instant prosecution of Petitioner for perjury where the Petitioner's alleged perjury consisted of his denials before a Grand Jury that he was a party to a "larger" price-fixing conspiracy than the conspiracy which had been charged in an earlier indictment on which Petitioner had been previously tried and acquitted, and where at the prior trial not only had the prosecution been allowed to prove the larger conspiracy and to argue from such proof that the jury should find the Petitioner guilty of the lesser conspiracy there charged, but also that same proof constitutes essentially all that the prosecution can show in its present attempt to establish Petitioner's alleged perjury before the Grand Jury?

PARTIES IN THE UNITED STATES COURT OF APPEALS

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Petitioner, Thomas Gannon, as Appellant, and Respondent, United States of America, as Appellee.

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No.: _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

THOMAS H. GANNON,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Thomas Gannon respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered, upon denial of a motion for rehearing or rehearing in banc, on July 31, 1992.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is reproduced in the Appendix to this Petition. The perjury indictment, and excerpts from Petitioner's Grand Jury testimony, is reproduced in the Appendix to the Petition.

JURISDICTION

By order dated July 31, 1992, the Court of Appeals denied Petitioner's timely motion for rehearing. A copy of that order appears in the Appendix. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

The Government seeks to prosecute the Petitioner for perjury in denying certain bid-rigging allegations before a Grand Jury to which he was summoned after he and his company were acquitted by a jury in a previous bid-rigging prosecution. Under the previous indictment, it was alleged that Petitioner and other road paving contractors conspired to rig bids to obtain slurry seal road paving work awarded by the Village of Pelham Manor, New York, and the Town of Brookhaven, New York. It was alleged that Petitioner and his company had agreed with the other contractors to submit "accommodation bids" that would facilitate one other contractor (Lansdell) in obtaining work let by the Village of Pelham Manor, and that in return Petitioner would win the work

of the Town of Brookhaven through similar accommodation bids by the other contractors. At trial, the prosecution sought to prove that Petitioner and the other contractors were trying to keep Lansdell out of Suffolk County. In the course of the trial, evidence was introduced to the effect that the contractors, including Petitioner, divided up the six maintenance districts of Suffolk County. This evidence was objected to by Petitioner but it was admitted as evidence of a larger conspiracy and to show Petitioner's knowledge and intent. Admitted into evidence was a Government-compiled summary of bids submitted to Suffolk County for slurry seal work let by the Suffolk County Department of Highways.

In summation, the Government relied upon its proof of the larger, all-encompassing conspiracy between Petitioner,

Lansdell and two other alleged co-conspirators, Bimasco and Ascon. Specifically, the prosecution argued that Petitioner had lied on the witness stand, and presented for the jury one simple issue:

> What this case comes down to then is who is telling the truth and who is not telling the truth?

(JA 242)

Following the verdict of acquittal in reference to the Brookhaven-Pelham Manor conspiracy, Petitioner was summoned before a Grand Jury and asked questions relative to Suffolk County highway bid rigging. His denial of having had conversations or attending meetings regarding such bid rigging led to the instant perjury indictment.

Petitioner's motion to dismiss this indictment, based on collateral estoppel,

was denied by the District Court without opinion. The Court of Appeals for the Second Circuit, in an opinion by Chief Judge Oakes, affirmed. In its opinion, the Court of Appeals discussed primarily what it apparently viewed as conflicts or possible conflicts between this Court's decisions in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084 (1990), and United States v. Felix, ___ U.S. ___, 112 S.Ct. 1377 (1992). It noted at one point early in its opinion that Petitioner relied upon Ashe v. Swenson, 397 U.S. 436 (1970). However, except for this passing mention of Ashe v. Swenson, the Court of Appeals otherwise ignored Ashe v. Swenson.

REASON FOR GRANTING THE WRIT

IN VIEW OF THE UNCERTAINTY ARISING OUT OF THIS COURT'S RECENT DOUBLE JEOPARDY DECISIONS, THIS COURT SHOULD GRANT REVIEW TO CONSIDER PETITIONER'S CLAIM THAT ASHE V. SWENSON, 397 U.S. 436 (1970) BARS THE INSTANT PROSECUTION

The Court of Appeals opinion reflects understandable confusion in attempting to apply this Court's recent opinions in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084 (1990) and United States v. Felix, ___ U.S. ___, 112 S.Ct. 1377 (1992). This confusion is best manifested by the Court below's discussion and reliance on Felix.

In fact, however, Felix has no application to Petitioner's case. The so-called "other crimes evidence" offered in Petitioner's case did not involve the common, garden variety sort of other separate crimes evidence discussed in Felix and United States v. Dowling, 493 U.S. 342, 110 S.Ct. 668 (1990). Rather, as the Court

of Appeals acknowledged in its opinion, here, the proof of the larger conspiracy was an integral part of the conspiracy charged in the indictment: "It may be that the Suffolk County bid rigging conspiracy grew out of the Pelham Manor/Brookhaven conspiracy -- in the sense that by giving Lansdell the bid for Pelham Manor, it was hoped by the others to keep Lansdell out of Long Island...(a).

In fact, the alleged bid rigging arrangements for Suffolk County highway districts ran contemporaneous with the alleged Pelham Manor/Brookhaven conspiracy. The success of all bid rigging arrangements depended upon the cooperation of Petitioner, Lansdell, Ascon and Bimasco. In short, the proof offered at trial was intended to show that the Pelham Manor/Brookhaven conspiracy charged in the indictment was dependent upon

the over-all bid rigging arrangement with Petitioner to control Lansdell, and all road work let by the various municipalities in Suffolk County.

Under these facts accepted by the Court of Appeals, the Court viewed application of the Double Jeopardy Clause in this case as turning solely on the Felix and Dowling decisions. In both Felix and Dowling, the other crimes evidence was in fact evidence of truly independent, separate and distinct offenses offered to meet specific issues raised by the defendant. In Felix, the defendant claimed he was acting in a covert DEA operation in the Missouri drug transaction on trial. The prosecution offered evidence of prior, separate drug transactions engaged in by the defendant which was the subject of a prior Oklahoma prosecution. In Dowling, the other crimes

evidence offered against the defendant consisted of a separate, subsequent burglary, for the limited purpose of refuting the defendant's claim of misidentification. Neither Felix nor Dowling dealt with the question, presented in this case, of the Government's relying in a conspiracy prosecution upon evidence of a larger contemporaneous conspiracy which would have included a smaller conspiracy charged in the indictment under which the defendants had been tried and acquitted.

Compare the prosecutor's statement at the prior trial of Petitioner that "this was all part of one conspiracy." (JA 139)

Directly relevant to the instant situation is what this Court stated in Ashe:

> The federal decisions have made clear the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'

397 U.S. at 443.

Here, however, the Court of Appeals ignored Petitioner's claim that Ashe barred his being reprosecuted under the guise of a perjury prosecution for the conspiracy with which he had already been charged, tried and acquitted. This is a classic case for the application of the Ashe test.

A realistic reading of the trial record, accepted by the Court of Appeals, shows that the jury was presented with one simple issue: Did Petitioner tell the truth when he denied all bid rigging allegations made by the prosecution and trial witnesses.

The jury could not have found that Petitioner told the truth as to the Pelham Manor/ Brookhaven conspiracy, but not as to the Suffolk County conspiracy. Both were linked to each other. In short, the application of Ashe should result in a determination in favor of Petitioner under the Double Jeopardy Clause.

On the other hand, it may be that Ashe no longer represents this Court's view of the applicability of the doctrine of collateral estoppel to criminal prosecutions pursuant to the Double Jeopardy Clause. Only this Court can answer this question and, it is submitted, this question by itself furnishes sufficient grounds to review this case. Plainly, as the instant decision of the Court of Appeals makes manifest, the lower courts require this Court's guidance on this issue.

At the same time, we note, it would appear from this Court's majority and dissenting opinions in Grady, that Ashe still represents sound law. See, 110 S.Ct. at 2092 (majority opinion) (citing inter alia Ashe v. Swenson); id. at 2097 (dissenting opinion).

Petitioner's case presents an important, serious question of the reach of the Double Jeopardy Clause in the context of a subsequent prosecution for conspiracy, where the potential for and likelihood of prosecutorial abuse is obvious. Here, an acquitted defendant was summoned before a Grand Jury by the same prosecutor, asked to repeat his direct testimony at trial, and later indicted for perjury on an issue determined in his favor by the petit jury in the prior trial.

As the Court stated in Grady, at 2091:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity...." **Green v. United States**,, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).'

This case presents this Court with the opportunity to give meaning to the concern expressed in Grady and Ashe that the Government's power to prosecute an acquitted individual should not be allowed to be abused.

CONCLUSION

For these reasons, we respectfully submit that a Writ of Certiorari should issue.

Respectfully submitted,

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Dated: September 10, 1992

APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 973—August Term, 1991

(Argued February 7, 1992 Decided June 10, 1992)

Docket No. 91-1560

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS H. GANNON, JR.,

Defendant-Appellant.

Before:

OAKES, *Chief Judge,*
CARDAMONE and PIERCE, *Circuit Judges.*

Interlocutory appeal from denial of a motion to dismiss a perjury indictment by the United States District Court for the Eastern District of New York, Leonard D. Wexler, *Judge.* Appellant contends that a trial on perjury charges would constitute relitigation of the conspiracy for which

he was previously acquitted in violation of the Double Jeopardy Clause.

We affirm.

JOSEPH W. RYAN, JR., Uniondale, NY (Irving A. Cohn, Judith Hepworth, Joseph W. Ryan, Jr., P.C., of counsel), *for Defendant-Appellant.*

JAMES W. LOWE, U.S. Department of Justice, Washington, DC (James F. Rill, Assistant Attorney General, Charles A. James, Deputy Assistant Attorney General, Robert B. Nicholson, John J. Powers, III, U.S. Department of Justice, Washington, DC; Charles V. Reilly, Edward Friedman, Patricia Howland, U.S. Department of Justice, New York, NY; Andrew J. Maloney, U.S. Attorney for the Eastern District of New York, New York, NY, of counsel), *for Appellee.*

OAKES, *Chief Judge*:

This appeal involves a question under the Double Jeopardy Clause. The government seeks to prosecute the appellant, Thomas H. Gannon, Jr., for perjury in denying certain bid-rigging allegations before a grand jury to which he was summoned after he and his company were acquitted by a jury in a previous bid-rigging conspiracy indictment. In the previous indictment, it was alleged that

he and other road paving contractors conspired to rig bids to obtain slurry seal road paving work awarded by the Village of Pelham Manor, New York, and the Town of Brookhaven, New York. It alleged that Gannon and his company had agreed with the other contractors to submit "accommodation bids" that would facilitate one other contractor (Lansdell) in obtaining work let by the Village of Pelham Manor, and that in return Gannon would win the work of the Town of Brookhaven through similar accommodation bids by the other contractors. At trial, the prosecution sought to prove that Gannon and the other contractors were trying to keep Lansdell out of Suffolk County. In the course of the trial, evidence was introduced to the effect that the contractors, including Gannon, divided up the six maintenance districts of Suffolk County. This evidence was objected to by Gannon but it was admitted as evidence of a larger conspiracy and to show Gannon's knowledge and intent. Admitted into evidence was a government-compiled summary of bids submitted to Suffolk County for slurry seal work let by the Suffolk County Department of Highways.

Following the verdict of acquittal in reference to the Brookhaven-Pelham Manor conspiracy, Gannon was summoned before a grand jury and asked questions relative to Suffolk County highway bid rigging. His denial of having had conversations or attending meetings regarding that bid rigging led to the instant perjury indictment.

In this interlocutory appeal from denial of a motion to dismiss the perjury indictment, *see Abney v. United States*, 431 U.S. 651, 662 (1977), Gannon relies upon the Double Jeopardy Clause and the doctrine of collateral estoppel, principally citing *Grady v. Corbin*, 110 S. Ct. 2084 (1990), as explicated in *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990), *vacated and remanded*, 60

U.S.L.W. 3715 (U.S. Apr. 21, 1992), as well as *Ashe v. Swenson*, 397 U.S. 436 (1970). The government, on the other hand, relies principally on *Dowling v. United States*, 493 U.S. 342 (1990), also as explicated in *Calderone*, 917 F.2d at 724 (Newman, *J.*, concurring) and as further elaborated upon recently by *United States v. Felix*, 112 S. Ct. 1377 (1992). While we think the question closer than the government makes it out to be, on balance we believe the teaching of the cases above mentioned requires us to affirm.

I. FACTS

In the 1970s and 1980s, Gannon and his company operated a road paving and highway repair business located in Coram in Suffolk County, eastern Long Island, which is denominated area 2 of the six different Suffolk County Maintenance Districts, and is located on the north shore of the island. Gannon's company was also favorably located to area 5, which encompasses Northport. Location is significant in the business because the closer the highway to be repaved is to the business operations, the less trucking and other expenses that may be involved. Proximity to the worksite, of course, is not the only factor which enters into the determination of costs. As came out in Gannon's testimony at his Pelham Manor/Brookhaven trial, among the other factors are: population density, since prior to commencing repaving all residents must be notified and alternate parking places found for them; road conditions; cost of labor and supplies, including meals and lodging, traffic time, tools, etc.; and availability of water for slurry seal operations. In the Pelham Manor/Brookhaven case, Gannon's testimony effectively substantiated the proposition that he could bid lower than

other bidders because of his proximity to the Town of Brookhaven, whereas he would have to bid higher, say, in the Village of Pelham Manor.

The prosecution in the Pelham Manor/Brookhaven conspiracy case sought to prove, through the testimony of Robert Lansdell, president of the Lansdell Company, Inc., and its Long Island manager, Eugene Martino, that Lansdell, Gannon, Ascon Distributing Corp., and Bimasco, Inc. submitted rigged bids so as to let Lansdell win work let by the Village of Pelham Manor, while Gannon would win work let by the Town of Brookhaven. The prosecution also sought to prove the existence of a larger conspiracy —that Gannon and the principals of Ascon and Bimasco had attempted to keep Lansdell, a larger east coast contractor, out of Suffolk County by facilitating his bidding efforts at Pelham Manor. The government pretrial brief indicated that the conspiracy, to which Lansdell and Martino would testify, involved "dividing up maintenance districts on the Suffolk County bid." According to the government, the participating contractors agreed in advance which company would be the low bidder in each area. Pursuant to the bidding scheme, the government alleged that Ascon proposed that Lansdell be allocated Pelham Manor in Westchester County in return for agreeing not to compete for slurry seal work on Long Island. Subsequently, the government alleged that Lansdell and Gannon made arrangements to ensure that Lansdell's bid would be lower than Gannon's for the Pelham Manor work.

When the government, during the trial, sought to elicit its proof of a broader conspiracy from the witness Lansdell, Gannon objected on the ground that the prosecution was offering proof of other crimes not charged. The prosecution successfully argued, however, that the proof was

offered as "evidence of a larger conspiracy [of] which Pelham Manor-Brookhaven was a part," and to show Gannon's knowledge and intent. The defense countered that the alleged Suffolk County conspiracy commenced a year later and was independent of the alleged Pelham Manor/Brookhaven conspiracy. The district court ruled in favor of the prosecution that the evidence of a larger conspiracy could be admitted under Fed. R. Evid. 404(b) as showing Gannon's intent and motive. Lansdell thus testified, over objection, to a meeting relating to the Suffolk County bidding system and the division of the six Suffolk County maintenance district awards through a bid-rigging scheme. In support of its broader conspiracy theory, the government submitted its Exhibit 58, a five-page summary of bids covering the years 1976-85 for each of the six maintenance districts. The exhibit detailed Lansdell's successful bids in areas 3, 4 and 5 in December 1977 bids, and in areas 3 and 4 from 1979-82, and area 4 from 1983-84, and Gannon's successful bids in areas 5 and 6, commencing in 1979 and continuing through 1985. On the basis of this evidence, the prosecution claimed that there was "sufficient evidence for the jury to conclude that this was all part of one larger conspiracy."

On cross-examination of Gannon, the government elicited from him denials about not just the Town of Brookhaven and Village of Pelham Manor bid-rigging agreements, but as to a 1979 meeting with Lansdell and the Bimasco and Ascon principals to divide up Suffolk County bids. Gannon also denied attending subsequent meetings in subsequent years.

In summation, the government sought to place the alleged Brookhaven/Pelham Manor conspiracy within the context of the larger conspiracy. The government argued that since Gannon had a half a million dollars a year's

worth of work from the Town of Brookhaven, had he lost that to Lansdell he would have had to venture into the exclusive havens of Ascon and Bimasco in Smithtown, Islip and Babylon, hence, the call from the Ascon principal to Lansdell, "If you leave us alone in eastern Long Island you can have Pelham Manor." The government further referred to "the patterns on the Suffolk County bid" and told the jury to "see how the patterns of bidding on that Suffolk County bid changed dramatically" after the alleged meeting of January 1979. In short, the prosecution argued that the agreement to divide up the maintenance districts in Suffolk county grew out of the agreement to allocate Pelham Manor and Brookhaven.

The district court charged the jury that "there is only one issue in this case. Did the defendants enter into a conspiracy for the bidding of slurry seal work in the village of Pelham Manor and the town of Brookhaven?" As indicated above, the jury acquitted Gannon and his company. A month after the verdict of acquittal, however, Gannon was summoned by the grand jury, and, after a grant of immunity under 18 U.S.C. § 6002 (1988), he was questioned about a meeting with other road paving contractors —particularly Martino of Lansdell, Harry Streuli from Ascon, and Grant Hendricks from Bimasco—called for the purpose of dividing up the Suffolk County bid including the bids for road work in certain towns on Long Island including Babylon, Smithtown and Islip. The grand jury indicted him for his negative answers in reference to his participation in discussions, conversations, and meetings about the bids, particularly in years following 1979, and also for saying he never told any other contractor what he intended to bid on. Gannon appeals from the district court's adverse ruling on his double jeopardy/collateral estoppel argument.

Appendix A
Opinion of United States Court of Appeals

II. DISCUSSION

Since *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the Court has held that the Double Jeopardy Clause of the Fifth Amendment prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes whenever the offense charged in the subsequent prosecution does not "require[ ] proof of a fact which the other does not." In *Illinois v. Vitale*, 447 U.S. 410, 419-21 (1980), the Court suggested that even if the *Blockburger* test did not bar a successive prosecution, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution. In *Grady v. Corbin*, 110 S. Ct. at 2087, the Court adopted the suggestion from *Vitale*, holding that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." In so doing, the Court made clear that "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." *Id.* at 2093. Citing *Dowling v. United States*, 493 U.S. 342 (1990), the Court noted that the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. The Court further elaborated that the *Blockburger* test is not a "same evidence" test since it has "nothing to do with the *evidence* presented at trial," but is concerned "solely with the statutory elements of the offenses charged." *Grady*, 110 S. Ct. at 2093 n.12. A prosecution, however, "cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence

offered to prove the same conduct." *Id.* at 2093. In *Grady*, the state had admitted that it would prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish "essential elements" of the homicide and assault offenses; therefore, the Double Jeopardy Clause barred the second prosecution.

In *Calderone*, a majority of the Second Circuit panel held that *Grady* barred reprosecution of Calderone and Catalano for activities related to heroin selling following acquittal in a previous conspiracy prosecution, which involved a larger conspiracy in addition to the heroin-selling activities alleged in the second prosecution. 917 F.2d at 722. The panel majority thought that the *Grady* test was intended to guide Double Jeopardy analysis in all cases involving successive prosecutions, not just in the limited circumstance involving successive prosecution of separate crimes arising from a single event. *Calderone*, 917 F.2d at 721. Consequently, it was of the view that to the extent that *United States v. Korfant*, 771 F.2d 660 (2d Cir. 1985) (per curiam), and other Second Circuit cases specified a balancing approach to determining whether successive prosecutions for overlapping conspiracies were barred—instead of the *Grady* "same conduct" test—these cases "were no longer good law." *Calderone*, 912 F.2d at 721. The panel majority opinion concluded that Grady's "same conduct" test barred prosecution not only of the conspiracy count but also of substantive telephone and heroin distribution counts. The panel majority reasoned that even though the defendants were not charged with the substantive crimes in the case previously prosecuted, they were prosecuted for the conduct that supported those offenses, which, pursuant to *Grady*, was sufficient to bar reprosecution. *Id.* at 722.

Appendix A
Opinion of United States Court of Appeals

Judge Newman's concurring opinion pointed out three distinctions between *Grady* and *Calderone*, none of which Judge Newman felt made *Grady* inapplicable: (1) *Grady* presented the issue whether the Double Jeopardy Clause barred prosecution under one statute after prosecution under a different statute; (2) *Grady* involved successive prosecutions of offenses arising out of a single occurrence whereas *Calderone* was concerned with continuing conduct; and (3) *Grady* did not involve "compound-complex crimes," a distinction accepted by the Third Circuit in *United States v. Pungitore*, 910 F.2d 1084, 1109-11 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991). *Calderone*, 917 F.2d at 722-23.

Judge Newman went on to say that he felt the word "element" in the *Grady* majority opinion was chosen with care and must be read with equal care to prevent the *Grady*-test from becoming a "same evidence test." *Calderone*, 917 F.2d at 723-24. Judge Newman suggested that the *Grady* "element" component "means barring the second prosecution only when the conduct previously prosecuted is to be used to 'establish' the element of the second crime," which Judge Newman thought "must mean 'constitute the entirety of' the element." *Calderone*, 917 F.2d at 724. He went on to point out that the majority opinion in *Grady* declined to overrule *Dowling*, even though the dissenters thought that the majority opinion had done so. *Calderone*, 917 F.2d at 724, *see also Grady*, 110 S. Ct. at 2095-96 (O'Connor, *J.*, dissenting) & 2102 (Scalia, *J.*, dissenting).[1] Judge Newman then sought to

1 In *Dowling*, the defendant was prosecuted successively for two separate robberies. Following acquittal for the first robbery, the so called Henry robbery, the defendant was prosecuted for a second robbery. At the second trial, the prosecution introduced evidence of the defendant's conduct in the Henry robbery to establish his identity as the perpetrator of the second robbery. The Court held that this use of rule 404(b) evi-

explicate *Grady*'s reference to "conduct that constitutes an offense for which the defendant has already been prosecuted," 110 S. Ct. at 2087, while preserving *Dowling*. He concluded that the *Grady*-test bars a second prosecution "whenever the defendant is at risk that the *entirety* of an element of an offense in a pending prosecution might be established by conduct constituting the *entirety* of a previously prosecuted offense (as in *Grady*), or the *entirety* of an element of such an offense, or the *entirety* of a distinct component of such an offense . . . ." *Calderone*, 917 F.2d at 725 (emphasis added). Under Judge Newman's analysis, *Grady* would not bar Gannon's prosecution for perjury relative to the Long Island conspiracy (the Suffolk County bid rigging), since the acquittal related only to the Pelham Manor/Brookhaven conspiracy—a conspiracy which constituted neither the entirety of an element nor the entirety of a distinct component of the perjury charge.

A case decided by the Supreme Court a few weeks after the Gannon case was argued sheds more light on the meaning of *Grady* and its application to the instant case. In *United States v. Felix*, the Court—following *United States v. Bayer*, 331 U.S. 532, 542-43 (1947), and *Pinkerton v. United States*, 328 U.S. 640, 643 (1946)—held that a substantive crime and a conspiracy to commit that crime are not "the same offense" for Double Jeopardy purposes even if they are based on the same underlying incidents. 112 S. Ct. at 1384. The Court noted that *Grady* had not questioned this established doctrine; the Court further noted that lesser included offense-type analyses—such as the *Grady* and *Blockburger* tests—are "much less helpful in analyzing subsequent conspiracy prosecutions that are

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dence did not violate the Double Jeopardy Clause. *Dowling*, 493 U.S. at 349-50.

supported by previously prosecuted overt acts." *Felix*, 112 S. Ct. at 1385.

The *Felix* Court elaborated on the Double Jeopardy analysis in two ways that bear on the case at hand. First, it pointed out that evidence of drug transactions in which Felix had participated in Oklahoma was first admitted against Felix for Fed. R. Evid. 404(b) purposes at the Missouri trial, the first prosecution, and that Felix was subsequently prosecuted for those same Oklahoma drug transactions. *Felix*, 112 S. Ct. at 1383 n.3. The Court specifically declined to adopt "a rule that the admission of evidence concerning a crime under Rule 404(b) constitutes prosecution for that crime," pointing out that under such rule the Double Jeopardy Clause would have barred the subsequent admission of the Henry evidence, thus, overturning *Dowling*. *Felix*, 112 S. Ct. at 1383 n.3.

Second, the Court referred in depth to our *Calderone* case, pointing out that the *Calderone* court decided that the conduct at issue in a conspiracy prosecution is not the agreement itself but the conduct from which the government asks the jury to infer that there was an agreement, and making specific mention of Judge Newman's conclusion that *Grady* bars a subsequent prosecution only when previously prosecuted conduct will be used to establish the entirety of an element of the second crime. *Felix*, 112 S. Ct. at 1385. The Court went on to say, after recounting these views, that "[i]t appears that while *Grady* eschewed a 'same evidence' test and *Garrett* [*v. United States*, 471 U.S. 773, 790 (1985)] rejected a 'single transaction' test, the line between those tests and the 'same conduct' language of *Grady* is not easy to discern." *Felix*, 112 S. Ct. at 1385. The Court, however, declined to become enmeshed "in such subtleties," staying with the

rule that a conspiracy to commit a crime is a separate offense from the crime itself. *Id.*

Applying the teachings of this line of cases to our present situation, Gannon's perjury charges are not barred by the previous acquittal. None of the perjury charges relate to the offense for which he was first prosecuted, namely, a conspiracy to rig bidding for Pelham Manor and Brookhaven. Rather, the perjury charges relate to bid rigging for the Suffolk County highway districts and possibly as to certain other Long Island municipalities. True, evidence as to the Suffolk County conspiracy was admitted under rule 404(b) in the Pelham Manor/Brookhaven case; Government exhibit 58, recounted above, specifically involved that Suffolk County highway district bidding. The *Felix* footnote referred to above, however, specifically says that admission of rule 404(b) evidence does not constitute a prosecution within the meaning of the cases. 112 S. Ct. at 1383 n.3. Beyond that, neither *Grady* nor *Felix* would support the proposition that acquittal of the Pelham Manor/Brookhaven conspiracy *necessarily* amounted to an acquittal as to the Suffolk County conspiracy. *See also United States v. Citron*, 853 F.2d 1055, 1058 (2d Cir. 1988) (government collaterally estopped from relitigating issues necessarily decided in favor of the defendant by a previous final judgment). It may be that the Suffolk bid-rigging conspiracy grew out of the Pelham Manor/Brookhaven conspiracy—in the sense that by giving Lansdell the bid for Pelham Manor it was hoped by the others to keep Lansdell out of Long Island—but this would not *necessarily* involve an agreement to rig the bids in Suffolk County involving the other paving contractors, Ascon and Bimasco. And it is the conversations relating to Suffolk County, which took place between the Ascon and Bimasco principals, Streuli and

Appendix A
Opinion of United States Court of Appeals

Hendricks, as to which Gannon was asked questions by the grand jury and to which he is alleged to have given false answers. In no sense would *Grady*, as explicated in *Felix* and *Calderone*, bar this prosecution.

Affirmed.

Appendix B
Order of United States Court of Appeals
on Petition for Rehearing
and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st of July, one thousand nine hundred and ninety-two.

FILED: July 31, 1992

DOCKET NUMBER: 91-1560

UNITED STATES OF AMERICA,
Appellee,

against

THOMAS H. GANNON, JR.,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellant, Thomas H. Gannon, Jr.

Appendix B
Order of United States Court of Appeals
on Petition for Rehearing
and Suggestion for Rehearing In Banc

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ _____
ELAINE B. GOLDSMITH, Clerk

Appendix C
Indictment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

THOMAS H. GANNON, JR.,

Defendant.

Cr. No. 91-402
(T. 18, U.S.C., §1623)

The Grand Jury charges:

1. Thomas H. Gannon, Jr., is indicted and made a defendant herein. At the time he made the declarations charged in this indictment, Thomas H. Gannon, Jr. was President of Thos. H. Gannon and Sons, Inc., a company headquartered in Coram, New York and engaged in the sale and application of slurry seal and other liquid bituminous materials (such as emulsified and cutback asphalt) within the State of New York.

2. On October 15, 1986, in the Eastern District of New York, Thomas H. Gannon, Jr. testified under oath as a witness before the federal grand jury duly empaneled by the United States District Court for the Eastern District

of New York, sitting in Brooklyn, New York and knowingly made false material declarations concerning a matter the grand jury was investigating, in violation of Title IV of the Organized Crime Control Act of 1970, 18 U.S.C. §1623.

3. At the aforesaid time and place, the grand jury was conducting an investigation to determine, among other things, if any firms engaged in the manufacture, supply, and application of slurry seal or other liquid bituminous materials in the State of New York had committed any violations of the Sherman Act, 15 U.S.C. §1, or related offenses such as 18 U.S.C. §1001 (false statements) or 18 U.S.C. §1341 (mail fraud).

4. It was material to this investigation to determine whether Thomas H. Gannon, Jr. had any knowledge of or information concerning bid rigging by representatives of companies that supplied slurry seal or other liquid bituminous materials in New York, including, among other things, knowledge of or information concerning discussions among representatives of suppliers of slurry seal or other liquid bituminous materials about bids or prices, agreements to submit complementary bids, agreements not to bid, agreements about which supplier of slurry seal or other liquid bituminous materials would submit the lowest bid, and agreements to allocate customers or territories for slurry seal or other liquid bituminous materials among companies supplying such materials. It was also material to this investigation to determine if Thomas H. Gannon, Jr. had participated in such conduct.

Appendix C
Indictment

5. At the aforesaid time and place, Thomas H. Gannon, Jr., while under oath, knowingly declared falsely before said federal grand jury with respect to the aforesaid material matters as follows:

[Declarations charged as false are underscored.]

Q. And you have also bid, but not successful[l]y, in certain other towns in Long Island, is that correct, Babylon, Smithtown, Islip?

A. Yes.

Q. Now, at any time during the time that you have been in business, have you discussed with Grant Hendricks or Harry Streuli or any other contractor, bidding in any of these localities your bidding generally, or with respect to any particular bid at any particular year?

Did you have any discussion about the effect of who should be a high bidder; who should be a low bidder; who should get what town?

A. No.

Q. Anything of that sort?

A. No.

Q. You never discussed that with Mr. Streuli at all?

A. No.

Q. Never discussed that with Mr. Hendricks?

A. No.

* * *

Q. Did you ever discuss the Suffolk County bid before bids were submitted with anyone from Bimasco, including Mr. Hendricks, anyone from Ascon including Harry Streuli, Bruce Streuli, anyone from Lansdell, including Robert Lansdell, Eugene Martino?

A. I don't recall ever having a discussion with them.

Q. You never attended a meeting in which there was a discussion of dividing up areas with the Suffolk County bid?

A. No.

Q. Or slurry seal or any other products?

A. No.

Q. You never had any such conversations?

A. I don't recall any.

Q. You are positive of that?

A. Yes.

* * *

Appendix C
Indictment

Q. Did anyone ever ask you to bid high in any particular area for any particular town or village or district or for any state contract?

A. No.

* * *

Q. Now, the bids for slurry seal and other liquid asphalt products submitted to Suffolk County show that you were not successful at all for slurry seal in 1976 or 1977, neither year did you submit a bid. You submitted a no-bid. In December of '77 which would have been for the '78 paving season; is that correct?

A. Yes.

Q. You bid but unsuccessfully in each area; then again in 1979, January of 1979, Bimasco was the low bidder in Area 1 and 2 except for Type B which Ascon was low on in Area 1; Lansdell was low in Area 3 and 4 and Gannon was low in Areas 5 and 6 which I previously said was the North Fork Shelter Island; and again in 1980 Bimasco was low in Areas 1 and 2; Lansdell was low in Areas 3 and 4; and Gannon was low in Areas 5 and 6.

And again, in 1981 Ascon was low in Area 1, Bimasco was low in Area 2, Lansdell was low in Areas 3 and 4; and Gannon was low in Areas 5 and 6.

In 1982 Ascon was low in Area 1, Bimasco was low in Area 2, Lansdell was low in Areas 3 and 4 and Gannon was low in Areas 5 and 6.

Appendix C
Indictment

In 1983 again Bimasco was low with respect to Type A and Ascon with respect to Type B and in Area 1 Bimasco was low in Area 2, Ascon was low in Area 3, Lansdell was low in Area 4 and Gannon was low in Areas 5 and 6.

Now is it your testimony again under oath today that you never discussed those bids before they were submitted with any representative of Ascon, Bimasco or Lansdell in any of these years?

A. No, I did not discuss the bids.

Q. Either as a group or with any individual from any of those companies?

A. No.

* * *

Q. Mr. Gannon, did any other slurry seal contractor ever tell you before a public bid was submitted -- by public bid I mean to town, village, county, state, governmental body, what he intended to bid or what his company intended to bid?

A. No.

Q. Did you ever tell any other contractor what you intended to bid on, a particular bid?

A. Absolutely not.

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Indictment

Q. Did any other contractor ever ask you to bid at or above a particular number?

A. No.

6. The aforesaid declarations of Thomas H. Gannon, Jr., as he then and there knew, were false in that prior to bids being submitted he had discussions with representatives of suppliers of slurry seal and other liquid bituminous materials doing business in the State of New York concerning the bids to be submitted to governmental entities located within the State of New York, prices that were to be bid, and which supplier would submit the low bid price.

7. The aforesaid declarations of Thomas H. Gannon, Jr. were made in the Eastern District of New York, within the period of any applicable statute of limitations, in violation of Title IV of the Organized Crime Control Act of 1970, 18 U.S.C . §1623.

DATED: 4/26/91

A TRUE BILL

Appendix C
Indictment

_____
Foreperson

/s/ _____
James F. Rill
Assistant Attorney General

/s/ _____
Charles V. Reilly

/s/ _____
Joseph H. Widmar

/s/ _____
Edward Friedman

/s/ _____
Ralph T. Giordano

/s/ _____
Patricia L. Howland

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/s/ _____
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United States Attorney
Eastern District of New York